United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 3, 2003

TO : Alan Reichard, Regional Director
William A. Baudler, Regional Attorney
Michael H. Leong, Assistant to Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Daniel Silverie III, Inc.
Case 32-CA-20467-1

512-5009
512-5012-8300
512-5072-0400

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by maintaining check-in and escort restrictions on access to its construction site, and threatened and caused the arrest of Union representatives who refused to abide by those restrictions. We conclude that the Employer's restrictions were not unlawful, and it had a reasonable basis for threatening and causing the arrest of the Union representatives who refused to abide by those restrictions.

FACTS

Carpenters Regional Council, the Union, has a history of picketing Daniel Silverie(the Employer) job sites for area standards. Because of past problems with access to the job sites, on March 28, 2002, the Employer issued a "Policy with Regard to Union Visitation at Job Sites" that requires Union representatives to identify themselves before entering a site. After contacting the Union subcontractor, the Union representative is to be escorted to the appropriate work area to meet with their members. Union representative Bonilla acknowledges knowing that this is the Employer's policy at all job sites.

The "46 Northern California Counties Carpenters Master Agreement," effective through June 30, 2004, provides that Union representatives are "permitted at all times upon any place or location where any work covered by this Agreement is being, has been or will be performed. Where there are visitation restrictions imposed at the jobsite by entities other than the individual employer, the individual employer will use his best efforts to provide access to the site by the Union representative."

On or about December 12, 2002, Union representatives Bonilla and Anzini were present at an Employer job site in

Santa Cruz where the Union was conducting area standards picketing. Bonilla states they saw what appeared to be unsafe working conditions at the site and decided to document it with a camcorder. They entered the site on a public road on which the Employer has an encroachment permit. Bonilla and Anzini were approached by a Santa Cruz police officer who said they were being arrested, at the request of the Employer's superintendent, Bob Ore, under a municipal code for trespassing on business property. Bonilla said they had a right to access construction sites under California law but the police officer disagreed and cited them under a municipal code. When the Union representatives appeared in court on March 18, 2003, the charge was dismissed because Ore failed to appear to testify. Union representative Bonilla acknowledges that they did not check in at the job trailer before entering the job site.

On or about March 19, 2003,[1] Union representatives Bonilla and Peacock entered another Employer job site in San Jose to speak with Union members employed by two of the subcontractors. The Union representatives did not check in with Employer officials before going on the site and San Jose police were called. The police said they were tired of being called to the site and that the Union representatives would be arrested if they entered the site again. The Employer's superintendent, Wenck, said they were not to enter the site without first checking in at the trailer. Bonilla told the police and superintendent Wenck that under California law they had the right to enter and speak with their members. Neither was arrested and they left the site.

On March 27, Bonilla and Peacock returned to the same site, called San Jose police to tell them they would be entering the site again without checking in and then went on the site to check and photograph working conditions. When they walked out of one of the buildings on site, they were met by Wenck and three police officers. Wenck said he wanted them arrested. Bonilla and Peacock were directed to stay in the paddy wagon for about 40 minutes. There was a discussion about whether any Union members were actually on the site at the time; the foreman claimed they were not. Wenck asked Bonilla if they were willing to check in first before going on site and Bonilla said no, that they were refusing to check in first because they had the right to go on site to check working conditions. Finally a police lieutenant said they could leave but the information would be forwarded to the DA to decide whether to file charges. No further action has been taken.

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[1] All dates hereafter are in 2003, expect where indicated.

On or about March 24, Union representatives Bonilla, Peacock and Fenton visited the Employer's site in Cupertino to speak with members employed by subcontractors. Dan Silverie confronted them and told them that unless they had Union signatory subs on the job they had no business there, that he wanted them to leave or he would call the police. Bonilla said he disagreed and Silverie began to follow them around the site as they documented and photographed various areas. Silverie then said he was going to call the police and left. However, the Union representatives completed their work and left the site without further incident or again seeing Silverie.

ACTION

We conclude that the Employer was privileged under California law to maintain a check-in requirement for visitors to its site. Since the Union representatives refused to check in before entering the Employer's property, the Employer had a reasonable basis for threatening and causing their arrest. We need not decide whether the Employer's escort requirement would be lawful, since the Union's entry onto the property without checking in was not protected.

The Employer's restriction on access

The Board looks to state law to determine whether nonemployee union representatives have trespassed on an employer's premises.[2] California defines civil trespass as "an 'unauthorized entry' onto the land of another," regardless of motivation.[3] Under California law, however, state labor law and policy limit private property interests.[4]

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[2] See Bristol Farms, 311 NLRB 437, 438-439 (1993); see also Wolgast Corp., 334 NLRB No. 31, slip. op. at 1 n.4 (2001), citing R&R Plaster & Drywall Co., 330 NLRB 87, 88 (1999), and Indio Grocery Outlet, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080, 1095 (9th Cir. 1999) (analyzing employers' property interest under state law).

[3] Civic Western Corp. v. Zila Industries, Inc., 135 Cal.Rptr. 915, 925 (Cal. App. 2 Dist. 1977).

[4] Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980). California state constitutional freedom of speech guarantees also limit property interests. See, Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979), affd. 557 U.S. 74 (1980).

In Sears, the California Supreme Court held that, under the Moscone Act (Cal. Code of Civ. Proc. § 527.3), the employer could not evict union pickets from the privately-owned sidewalk surrounding its store.[5] The court found that, independent of any constitutional right, the State of California could permit union activity on private property as a matter of state labor law.[6] The court interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California decisions.[7] Because Schwartz-Torrance[8] and In Re Lane[9] had established the legality of peaceful union picketing on private sidewalks outside a store, the court concluded that the State Legislature had now codified this rule into its labor statutes.[10]

Inasmuch as state law is the basis for the Employer's obligation to grant access, it is appropriate to look to California state time, place, and manner access to property law to define the scope of the employer's property interest.[11] For, "[o]nce the Respondents establish a

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[5] Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. at 381.

[6] The court noted Robins v. Pruneyard, recently decided, and said that:

> The Robins decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure Section 527.3; accordingly, we express no opinion on whether the California Constitution protects the picketing here at issue.

[7] Sears, 158 Cal.Rptr. at 375-376.

[8] Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union, 40 Cal.Rptr. 233 (1964), cert. denied 380 U.S. 906 (1965) (reversing injunction of union picketing on privately owned sidewalk outside bakery involved in labor dispute).

[9] In Re Lane, 79 Cal.Rptr. 729 (1969) (reversing trespass conviction of union representative who handbilled on privately owned sidewalk outside supermarket involved in labor dispute).

[10] Sears, 158 Cal.Rptr. at 379.

[11] Glendale Associates, Ltd., 335 NLRB No. 8 (2001).

legitimate time, place, and manner restriction pursuant to state law, then 'the law that creates and defines the employer's property rights' allows them to exclude the non-complying individual or party."[12]

In California, the courts have not yet decided whether and to what extent time, place, and manner restrictions may be imposed on union activity protected under the Moscone Act.[13] In construing that statute, California has found unprotected only conduct that implicated union violence and obstruction.[14] In analogous analysis under the California state Constitution, however, California state courts have suggested that reasonable time, place, and manner restrictions are legitimate.[15] They have held that an Employer may lawfully require Union representatives to

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[12] Id., slip op. at 3 n.12 (rejecting the balancing of an employer's property interest with a union's Section 7 right of access to determine the lawfulness of a rule requiring advance notice of a visit).

[13] See Safeway/Caltex/Pinkerton Securities, Case 20-CA-30107-1 et al., Advice Memorandum dated March 29, 2002.

[14] As stated, the Moscone Act's protection does not extend to conduct involving "violence or breach of the peace," Cal. Civ. Proc. Sec. 527.3(b)(1), or involving "disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." Cal. Civ.Proc. Sec. 527.3(e). See Kaplan's Fruit & Produce Co. v. Superior Ct., 160 Cal.Rptr. 745, 747 (Cal. 1979) (picketing which obstructs access is not "peaceful" picketing protected by the Moscone Act); M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers, 177 Cal.Rptr. 690, 693-694, 701-703 (Cal. Ct. App. 1 Dist. 1981) (upholding injunction limiting number and location of pickets where union obstructed access to restaurant and threatened/intimidated customers); Int'l Molders and Allied Workers v. Superior Court, 138 Cal.Rptr. 794, 800 (Cal. Ct. App. 3 Dist. 1977) (upholding injunction limiting number and location of pickets where union engaged in threats of violence and interference with access).

[15] Pruneyard, 153 Cal.Rptr. at 860-861 (reasonable time, place, and manner regulations permissible; those wishing to publish their ideas do not have "free rein" as to the time, place, or manner). See Glendale Associates, 335 NLRB No. 8, slip op. at 2 & n.7 (time, place, and manner restrictions applicable). See also Lechmere, Inc. v. NLRB, 502 U.S. at 535, 539 (state trespass law applies).

provide prior identification before engaging in union activity on the employer's property.[16] Also, because the state will not impose vicarious liability on unions for unlawful acts of its agent absent clear proof of authorization of, or participation in, such acts,[17] a California employer has a particular need to identify union visitors to its jobsite. In our view, it is likely that California courts would find a check-in requirement on a construction site a legitimate time, place, and manner restriction because it would help a general contractor guarantee safety when visitors are on a jobsite, without restraining union representatives' activities in dealings with their members.[18]

Therefore, we conclude that state property law would permit the Employer to condition the Union's access to the jobsite on a requirement that the Union first check in with the Employer. Since the Union representatives clearly had notice of this requirement, and they refused to comply with it, their entry onto the property was not protected and the Employer was privileged to attempt their removal.[19]

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[16] See UNITE v. Superior Court of Los Angeles County, 56 Cal. Rptr. 2d 838 (Cal. App. 2 Dist. 1997) (prior identification requirement upheld as a reasonable means of identifying persons who might be responsible for injury or damage). Accord: J-CHH Associates v. Citizens for Representative Government, 238 Cal. Rptr. 841, 852 (Cal. App. 2 Dist. 1987) (in requesting petitioning individuals' telephone numbers, addresses, and "identification" numbers, Employer seeks a reasonably limited means of determining the identity and location of these individuals, should it need to pursue a liability claim).

[17] See California Labor Law 1138 (2000).

[18] We note that this conclusion is consistent with Board decisions holding that a non-signatory general contractor's obligation to grant access consistent with a broad access provision in a subcontractor's collective-bargaining agreement nevertheless permits it to impose reasonable check-in requirements. See, e.g., Wolgast Corp., 334 NLRB No. 31, slip. op. at 2, 11 ("[an employer] can impose reasonable rules, e.g., a requirement that union representatives visiting a jobsite check in at the trailer or notify the person in charge of the jobsite of their presence....").

[19] For that reason, we need not address the Employer's escort requirement.

The arrest and threats to arrest

Since, in our view, the Employer had a reasonable basis for denying the Union access to the jobsite, we conclude that the arrest and threats to arrest did not violate Section 8(a)(1) of the Act.

In Johnson & Hardin Co.,[20] the Board held that it would view a criminal trespass complaint under the same standard for determining whether a civil lawsuit violates Section 8(a)(1). Before the Supreme Court's recent decision in BE&K Construction Co. v. NLRB,[21] the Board used different standards for determining whether a civil lawsuit violates the Act, depending on whether the suit was ongoing or concluded. The Board followed the directives of Bill Johnson's Restaurants.[22] In that case, the Court held that the Board may find the prosecution of an ongoing lawsuit unlawful if the suit lacks a reasonable basis in fact or law and was brought for a retaliatory motive.[23] As to concluded suits, the Court explained that if the concluded proceedings result in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, then the Board could proceed to find a violation if the suit was filed with a retaliatory motive.[24] In determining whether the suit had been filed in retaliation for the exercise of employees' Section 7 rights, the Board could take into account that the suit lacked merit, and that the suit attacked what the Board determined to be protected conduct.[25]

BE & K Construction Co. involved a completed lawsuit. Applying the "concluded suit" standard of Bill Johnson's, the Board found the suit was "unmeritorious" since all of the petitioner's claims were rejected by the district court on the merits, or were voluntarily withdrawn with prejudice.[26] The Supreme Court, however, explained that a

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[20] 305 NLRB 690, 691 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995).

[21] 122 S. Ct. 2390 (2002).

[22] 461 U.S. 731 (1983).

[23] Id. at 742-743.

[24] Id. at 747, 749.

[25] Id. at 747.

finding that a suit is non-meritorious is insufficient because it may be reasonably based even though it is ultimately unsuccessful. And, the prosecution of a reasonably based suit implicates First Amendment concerns. Although the suit may attack activity that is ultimately determined to be protected, the suit nevertheless enjoys First Amendment protection if the plaintiff reasonably believes the conduct is unprotected and illegal.[27] Similarly, the Court reasoned that inferring a retaliatory motive from evidence of animus would condemn genuine petitioning in circumstances where the plaintiff's "*purpose* is to stop conduct he reasonably believes is illegal."[28] For the Court, then, the Board's retaliatory motive standard incorrectly "broadly cover[ed] a substantial amount of genuine petitioning."[29] The Court left open whether any other showing of retaliatory motive could suffice to condemn a reasonably based, but unsuccessful suit. It intimated that suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for protected activity, may be unlawful.[30]

Here, the arrest of Union representatives Bonilla and Anzini was dismissed because the Employer's witness failed to appear. Therefore, there was no ultimate determination by the state court of the merits of the arrest. Under BE & K, however, the reasonableness of the action, as well as its ultimate disposition, is significant. Because there was no airing of evidence or decision on the merits, we cannot take the dismissal as demonstrating the arrest lacked a reasonable basis. In any event, we would not argue that the Employer lacked a reasonable basis for causing the arrest because, as we discussed above, the Union refused to comply with a lawful restriction the

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[26] 329 NLRB 717, 722-723 (1999).

[27] 122 S. Ct. at 2399-2401, citing Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) (suit may be condemned as anti-trust violation only if it is objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits, and it is subjectively a sham attempt to use government process - as opposed to the outcome of the process - as an anti-competitive weapon).

[28] Id. at 2401 (emphasis in original).

[29] Id. at 2400.

[30] Id. at 2402.

Employer placed on access, and the Employer was reasonably based in its belief that the check-in requirement conformed to California law.

We also conclude that the Employer did not cause the arrest with an unlawful retaliatory motive. There is no evidence that the Employer lacked a genuine desire to eject the Union representatives from the jobsite, and to stop conduct that it correctly believed was illegal.[31]

Accordingly, the Region should dismiss the charge, absent settlement,

B.J.K.

[31] Since the Employer was privileged to seek the removal of the Union representatives from the property and cause their arrest, the threats of arrest did not interfere with Section 7 interests.